

Carl D. Crowell, OSB No. 982049  
email: carl@crowell-law.com  
Drew P. Taylor, OSB No. 135974  
email: drew@crowell-law.com  
CROWELL LAW  
P.O. Box 923  
Salem, OR 97308  
(503) 581-1240  
Of attorneys for plaintiff

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

**DALLAS BUYERS CLUB, LLC,**

Plaintiff,

v.

**DOE-71.238.61.141,**

Defendant.

Case No.: 3:16-cv-00551-AC

PLAINTIFF'S MOTION TO PERMIT  
ALTERNATIVE MAIL FRCP 45  
SERVICE ON NON-PARTY;  
EXHIBIT 1

---

LR 7-1 Conferral

The identity of the defendant is presently unknown. The subscriber in this matter appears to be evading service, necessitating this motion. Plaintiff is without sufficient contact information for the subscriber to permit conferral.

**PLAINTIFF'S MOTION TO PERMIT ALTERNATIVE OR MAIL FRCP 45**  
**SERVICE ON NON-PARTY**

Having been granted leave to issue a subpoena to the subject non-party subscriber in this matter pursuant to Standing Order 2016-8, and after good faith attempts at personal service, plaintiff now moves the Court for an order permitting plaintiff to effect service of its FRCP 45

subpoena by U.S. Mail, delivery confirmation, or such other manner as the Court deems proper to provide delivery and notice. A proposed subpoena is filed herewith as Exhibit 1.

This motion is supported by the co-filed declaration of counsel and Exhibits.

## MEMORANDUM

### **I. Background**

In accord with Standing Order 2016-8, plaintiff has subpoenaed Internet Service Provider (“ISP”) Comcast, which has successfully identified a singular subscriber assigned the IP address used by the Doe defendant. Decl. Counsel, ¶ 3. On May 16, 2016 an initial letter and copy of Standing Order 2016-7 were dispatched to the subscriber. A follow up letter was dispatched on May 23, 2016. Decl. Counsel, ¶ 4; Exhibits 2 and 3. After receiving no response, plaintiff sent out for service an FRCP 45 subpoena for the deposition of the subscriber pursuant to Standing Order 2016-8. Based on the reports from plaintiff’s process server, it appears that the subscriber is willfully evading service, as such reports include:

6/3/2016 2:20 PM	Spoke with Male roommate who states that Sara is not home, states that he does not know her work hours.
6/6/2016 1:47 PM	Spoke with a 30 year old blonde female who states that Sara is at work.
6/8/2016 8:26 AM	There is no answer at the door.
6/11/2016 10:04 AM	There are cars here and it feels like there are people home. There is no answer at the door.
6/13/2016 7:32 PM	There are lights on in the kitchen and there is no answer at the door.
6/17/2016 8:11 AM	There drapes are closed and there is no answer at the door, there are two vehicles here with plate numbers [REDACTED] and [REDACTED].
6/20/2016 4:02 PM	The apartment door is standing open, I call out to anyone in the house. I go around back and there is no one there. I walk back around the house and there is a White Female in her early 20’s with magenta hair walking up the driveway. I go to speak with her and she walks right past me, won’t stop to talk. I ask about Sara, she replies “well sometimes she

	stays here.” When I attempted to ask further questions she goes inside and closes the door in my face. No one inside with answer the door now.
6/23/2016 8:17 PM	There is no answer at the door. I tried to speak with a neighbor but the only house next door is vacant.
6/25/2016 9:40 AM	The cars are here and the drapes are open. There is no answer at the door.

Decl. Counsel, ¶ 5.

With clear notice of this issue to the subscriber in the initial notice by Comcast, the multiple letters sent by plaintiff’s counsel (Exhibits 2 and 3), and the process server’s conversations with the subscriber’s roommates, it is clear that the subject subscriber is now actively evading service of plaintiff’s FRCP 45 subpoena.

As such, plaintiff now requests leave to serve the subject FRCP 45 subpoena, in the form filed as Exhibit 1, by U.S. Mail, delivery confirmation, or other means as directed by the court to effect notice and delivery for service.

## **II. FRCP 45 Service Standards**

Service standards for FRCP 45 are somewhat vague. (“Serving a subpoena requires delivering a copy to the named person...” FRCP 45 (b)(1)) Though often interpreted as requiring personal and direct delivery, at least one court in this District has noted in passing that personal service is not required by FRCP 45 and that use of a service such as Federal Express may be proper. *NxSystems, Inc. v. Monterey Cnty. Bank*, 12-cv-00905-ST (D. Or., Sept. 17, 2012), citing *Western Resources, Inc. v. Union Pacific R.R. Co.*, No. 00-cv-20430-CM, (D Kan July 23, 2002); see also *Green v. Baca*, 02-cv-20474, (CD Cal Jan. 31, 2005) (agreeing that FRCP 45 is not limited to personal service). The 7<sup>th</sup> Circuit has ruled expressly on this point

and allows service by U.S. Mail. *Ott v. City of Milwaukee*, 682 F.3d 552, 557 (7th Cir., 2012)(“An agent of the postal service surely qualifies as a ‘person at least 18 years of age and not a party.’”). *Note Hall v. Sullivan*, 229 F.R.D. 501 (D. Md. 2005) (denying motion to quash FRCP 45 subpoena served by mail but and discussing split of authority, including *Chima v. U.S. Department of Defense*, 23 Fed. Appx. 721 (9th Cir. 2001) (unpublished opinion refusing to compel when service was by mail.)).

To the extent this issue has been analyzed there is a split in authority with apparent balancing factors being the equities of the parties and the specifics and circumstances for each case. While plaintiff does not maintain that an FRCP 45 subpoena is always properly served by U.S. Mail, delivery confirmation, plaintiff moves the Court to follow the guidance of *Dallas Buyers Club, LLC v. Doe*, 6:15-cv-00221-AC (D. Or., May 22, 2015) and *NxSystems, Inc. v. Monterey Cnty. Bank*, 12-cv-00905-ST (D. Or., Sept. 17, 2012) and other courts and find that where reasonable efforts to effect personal service have been made and there are indicia that the party to be served is evading service, such as in this case, that service of an FRCP 45 subpoena by U.S. Mail with delivery confirmation shall constitute “delivering a copy to the named person” in accordance with FRCP 45.

DATED: July 13, 2016

Respectfully submitted,

CROWELL LAW

s/ Drew P. Taylor

Carl D. Crowell, OSB No. 982049  
email: carl@crowell-law.com  
Drew P. Taylor, OSB No. 135974  
email: drew@crowell-law.com  
(503) 581-1240  
Of attorneys for the plaintiff